

87-LW-1337 (5th)

Louis W. BACHMAN, et al., Plaintiffs-Appellants,

v.

Clyde E. LEWIS, et al., Defendants-Appellees.

No. 86-CA-31.
5th District Court of Appeals of Ohio, Delaware County.
Decided on May 8, 1987.

Civil Appeal from Common Pleas Court, Case No. 84-CIV-295.

George E. Lord, Columbus, for plaintiffs-appellants.

John M. Alton, Jeffrey J. Jurca, Columbus, for defendants-appellees.

OPINION

MILLIGAN, Presiding Judge.

LEGAL MALPRACTICE^STATUTE OF LIMITATIONS, R.C. 2305.11, COMMENCEMENT^DISCOVERY RULE/TERMINATION
RULE/SUMMARY JUDGMENT, CIV.R. 56^CONTINUOUS REPRESENTATION

The Delaware County Common Pleas Court granted summary judgment to the defendants, dismissing the legal malpractice claims of the plaintiffs-appellants. They appeal, assigning a single error:

THE TRIAL COURT ERRED IN ITS FINDING THAT NO GENUINE ISSUE AS TO ANY MATERIAL FACT EXISTED ON THE QUESTION OF THE RUNNING OF THE STATUTE OF LIMITATIONS AND THAT DEFENDANTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

For purposes of summary judgment, Civ.R. 56, appellants claim there is a genuine dispute over the material fact of when the attorney-client relationship terminated between appellants and appellees. Stated differently, there is a genuine dispute as to when the one year statute of limitations, R.C. 2305.11(A), began to run.

Supplications by the respective parties pursuant to Civ.R. 56 establish the following time ladder:

June 27, 1978^Contingent fee agreement between the parties employing appellees as attorneys;

April 23, 1979^Will contest case settled;

May 20, 1980^Devised property received;

May 27, 1980^Appellants paid appellees' legal fees;

November 20, 1980^Appellees delivered and recorded the deed transferring real estate appellants were to receive as a result of the will contest settlement. Delivered with the deed was a bill to appellants for \$10.70 for recording two deeds, costs;

After November 20^Appellants paid the cost bill by check, Bachman Deposition, page 46;

November 13, 1981^Appellants filed their malpractice action against appellees. (This action was voluntarily dismissed, preserving both the filing date of the appellants' claim and the statute of limitations defense as to the

appellees' defense, and was refiled in 1984. Thus limitation issues are governed by the above dates.)

The original legal employment agreement, executed June 27, 1978, retained appellees "to act for them and in their behalf in an action wherein the will of Zepha M. Nassano is or may be the subject of a will contest by the clients." The agreement further states:

The attorneys have accepted and do hereby accept said retainer and employment and agree and undertake to negotiate for a settlement of said claim, to undertake legal proceedings thereon, and prosecute the same to final determination, and to do and to perform all other acts, which, in the judgment of the attorneys, are necessary or proper to enforce and protect the rights of the clients

The settlement agreement filed with the court resulted in the will espoused by the appellants and appellees being admitted as the last will and testament. It contained other agreements.

By the terms of the admitted and probated will, appellant Clyde Lewis was named executor of the estate.

The extensive rationale and analysis of the trial court is replicated and attached hereto.

Metaphorically, appellee originally wore a hat of representation of the appellants; at some point he wore the hat of representation of the estate; and the evidence allows the conclusion that he wore both hats at once for some period of time.

We are persuaded that the evidence presented upon the motion for summary judgment, construed most favorably to the plaintiffs, creates a genuine and material fact issue as to when the legal representation of the appellants by appellees terminated. Particularly in view of the events of November 20 and following, a fact finder could conclude that services did not terminate until that date.

With respect to the issue of "discovery," it is likewise clear to us that the appellant claims he continued to rely upon his attorney even after he became suspect of the quality of the representation. See Vail v. Townsend (1985), 29 Ohio App.3d 261 (The "continuous representation doctrine" tolls the running of the statute of limitations on causes of action for legal malpractice accruing under the "discovery rule.").

We sustain the assignment of error, reverse the judgment of the Delaware County Common Pleas Court, and remand this cause for further proceedings according to law.

HOFFMAN and WISE, JJ., concur.

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

LOUIS W. BACHMAN, et al., Plaintiffs,

vs.

CLYDE E. LEWIS, et al., Defendants.

Case No. 84-CIV-295

Sept. 30, 1986.

JUDGMENT ENTRY

LOVE, Judge.

This matter came on for hearing on defendants' Motion for Summary Judgment. This Court finds that the attorney-

client relationship between the plaintiffs and the defendants terminated more than one year before the original filing of this action on November 13, 1981. Specifically, the attorney-client relationship terminated on June 6, 1979, when the will contest action filed by defendants on plaintiffs' behalf was settled. Even assuming other possible dates of termination of this relationship, e.g. May 20, 1980 (the date plaintiffs received the property devised to them), or May 27, 1980 (the date plaintiffs paid defendants for their services), these dates are also more than one year before the malpractice suit against defendants was filed. Furthermore, the Court finds, on the basis of plaintiff Louis Bachman's deposition testimony, that he discovered the legal injury allegedly caused by the defendants prior to the will contest settlement in 1979, again over a year before this action was filed.

Therefore, this action is barred by the statute of limitations set forth in R.C. 2305.11(A). Having construed the evidence most strongly in favor of plaintiffs, the Court finds that reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiffs. There is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law. It is therefore ORDERED, ADJUDGED and DECREED that defendants' Motion for Summary Judgment is well taken and is hereby granted. Costs to plaintiffs.

/s/RODNEY M. LOVE, VISITING JUDGE

BY ASSIGNMENT

/s/George E. Lord

Attorney for Plaintiffs

/s/Jeffrey J. Jurca

Attorney for Defendants

LANE, ALTON & HORST

155 East Broad Street

Columbus, Ohio 43215

(614) 228-6885

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

LOUIS W. BACHMAN, ET AL., PLAINTIFFS,

VS.

CLYDE E. LEWIS, ET AL., DEFENDANTS.

CASE NO. 84-CIV-295

DECISION & ORDER

LOVE, Judge.

This matter is before the Court on the motion of Defendant, Clyde E. Lewis, for summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure.

FACTS

Plaintiffs Louis and Helen Bachman were named beneficiaries of a certain tract of land in Delaware County under a will executed by Zepha Nassano on November 8, 1973. Miss Nassano died on October 3, 1977, at which time another will was discovered, alleged to have been executed by Miss Nassano on September 11, 1977. The Bachmans were not named beneficiaries under the second will, thus they retained Defendant Clyde Lewis to represent their interests under the first will.

Pursuant to this representation agreement, Mr. Lewis caused a will contest to be filed. A settlement was reached wherein the parties agreed to admit the 1973 will to probate, and the agreement was filed in the Delaware County Court on June 8, 1979. Before the Bachmans received their devise, Mr. Lewis, who was also named executor of the Nassano will, had a survey done to determine the exact acreage the Bachmans were to receive under the terms of the will. The will provided:

Item III. "I therefore give, bequeath and devise to Louis W. Bachman and Helen Bachman that land lying east of old 3 C's highway and north of Farm Lot 4 in Range 17, Township 3, Section 1, Farm Lot 3, Genoa Township, Delaware County, Ohio, and having frontage on Hoover Reservoir and being approximately 5.7 acres, more or less, with approximately 500 foot frontage on the old 3 C's highway as may be more specifically determined by a survey which I instruct my executor and trustee to have made for the purpose of conveying said land upon my death to Louis W. Bachman and Helen Bachman, or to the survivor of them, absolutely and in fee simple."

In the Matter of the Estate of Zepha M. Nassano, Case No. 79-121. (Delaware County, August 11, 1982)

After reviewing the first survey, the Bachmans asked Mr. Lewis to conduct another survey, allowing them an additional fifty feet frontage on Old 3-C Highway and assuring their access to a building on their property. Mr. Lewis then conveyed to the Bachmans the land described in the second survey on May 20, 1980. On May 27, 1980, the Bachmans issued a check to Mr. Lewis for the agreed contingency fee for representing them in the will contest.

Continuing his administration of the Nassano estate, Mr. Lewis then gave an option to purchase 36 acres of land still owned by the estate and adjacent to the Bachman's parcel to a Mr. and Mrs. Richard Swearingen. The option was exercised on December 6, 1980. The Bachmans then brought a quiet title action seeking private easement rights and naming as defendants the Swearingens, Clyde Lewis (as executor of the Nassano estate), and the relevant utility companies. The case went to the Court of Appeals and was partially reversed. The ultimate resolution by Judge Ruzzo was an order to the Bachmans to reconvey to the executor that portion of land additionally requested by them (approximately .152 acres from Lot 4) and an order to the executor, Mr. Lewis, to convey to the Bachmans an additional acre of land from Lot 3. These orders followed the Court of Appeals opinion that the Executor had no power to convey to the Bachmans any property other than that described exactly in the will, that is, only property from Lot 3.

The Bachmans also filed an attorney malpractice action against Clyde Lewis on November 13, 1981, more than one year after they had paid Mr. Lewis and more than two years after the will contest settlement was filed. That action was dismissed without prejudice, although the parties agreed at that time that if the action were refiled, Mr. Lewis would have whatever defenses were available as of November 13, 1981, including the defense of the Statute of Limitations.

Defendants contend that they are entitled to summary judgment because (1) the claims are barred by the Statute of Limitations, (2) Defendants are immune from liability as a matter of law because no attorney-client relationship existed at the time of the acts complained of, (3) Plaintiffs' claims are barred by the doctrine of collateral estoppel, and (4) that any damage to Plaintiffs was not proximately caused by Defendants.

A thorough review of the facts and applicable law in this case reveals that Plaintiffs' claims are, indeed, time-barred; therefore there is no need for this Court to discuss Defendants' second, third, and fourth arguments.

LAW AND ANALYSIS

O.R.C.] 2305.11(A) states:

"An action for malpractice shall be brought within one year after the cause thereof accrued

Up until 1983, application of this statute was made under the "termination" rule where a cause of action accrues at

the latest when the attorney-client relationship terminates. Penton Co. v. Kolby, 27 Ohio St.2d 234, 271 N.E.2d 772 (1971); Hibbet v. Cincinnati, 4 Ohio App.3d 128, 446 N.E.2d 832 (1982).

Because of the harsh results which sometimes occurred under Keaton, in 1982 the Supreme Court overruled Keaton and adopted a "discovery" rule whereby a legal malpractice action begins to run when the client discovers, or in the exercise of reasonable care and diligence, should have discovered the resulting injury. Skidmore & Hall v. Rossman, 5 Ohio St.3d 210, 450 N.E.2d 684 (1983). This rule encompasses a more realistic view of the malpractice problem and is compatible with the discovery rules adopted in medical malpractice actions and occupational disease claims. Oliver v. Kaiser Community Health Foundation, 5 Ohio St.3d 111, 449 N.E.2d 438 (1983); O'Stricker v. Jim Walter Corp., 4 Ohio St.3d 84, 447 N.E.2d 727 (1983). In the first malpractice action filed by the Bachmans against Lewis, the parties were bound under the old "termination" rule. Three possible dates exist for the termination of the relationship between the Bachmans and Mr. Lewis. First, there is the date of the will contest settlement, June 6, 1979. It can be said that on that date, when the settlement agreement was filed in court, that Mr. Lewis definitively secured what benefits he could for the Bachmans under the Nassana will, per their representation agreement.

The second possible date for termination is May 20, 1980, the date the Bachmans actually received the property devised to them. The third possible date is one week later, May 27, 1980, the date the Bachmans tendered a check to Mr. Lewis for his services. No further requests for representation were made to Mr. Lewis after May 27, 1980. There is no true issue of fact as to which of these dates should be deemed the date of termination, as all three are more than one year before the malpractice suit was filed, November 13, 1981. Thus, at that time Mr. Lewis had a clear Statute of Limitations defense under the Keaton rule.

Under the present day "discovery" rule, the Court must look at when the client may have or should have discovered the injury. This Court has identified three possible dates on which Plaintiffs, by their own admissions, agreed that ingress and egress to their property would be cut off when they received their devise. The first date of this knowledge was some time before the will contest settlement in 1979 as Mr. Bachman stated clearly in his deposition. The second possible discovery date is December 6, 1980, when Mr. Swearingen took title to the adjacent 36 acres and the Bachmans subsequently filed their quiet title and easement action. A third discovery date may be August 11, 1982, the date of the decision in the quiet title action when the Bachman's easement was definitely denied.

This Court is inclined to hold Mr. Bachman to his admissions of knowledge of the problem as early as 1979, although even using the latter 1982 date, the very latest Plaintiffs could have filed this action was August 11, 1983. Clearly under application of either the "termination" rule or the "discovery" rule, Plaintiffs' action herein filed on June 14, 1984 is time barred.

CONCLUSION

Rule 56(C) states:

"Summary judgment shall be rendered forthwith if there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law "

The facts before this Court show many possible dates when Plaintiffs were aware of their alleged injuries. Even construing this evidence in the light most favorable to Plaintiffs, Defendant are entitled to judgment as a matter of law.

Though it is not imperative to the resolution of this case, the Court notes that the heart of Plaintiffs' Complaint appears to be that they received exactly what was devised to them under Miss Nassano's will. They are aggrieved because the gift turned out to be inconvenient and expensive, though Mr. Lewis ably secured the property at their request. If indeed ownership of the parcel has damaged Plaintiffs, it is the fault of the late Miss Nassano in the manner in which she expressed her generosity in the will admitted to probate.

Defendants' Motion for Summary Judgment is well taken and is hereby granted.

Costs are awarded for the Defendants and against the Plaintiff.

RODNEY M. LOVE

Visiting Judge by Assignment

Copies mailed to:

Mr. George E. Lord

C/o Hyatt Legal Services

4823 Salem Avenue

Dayton, Ohio 45416

Mr. Jeffrey J. Jurca

Lane, Alton & Horst

155 E. Broad Street

Columbus, Ohio 43215

AGREEMENT

This Agreement, made and entered into this 27th day of June, 1978, by and between Louis W. Bachman, hereinafter called the clients, and LEWIS, LEWIS & LEWIS CO., L.P.A., hereinafter called the attorneys, WITNESSETH:

The clients hereby retain and employ the attorneys to act for them and in their behalf in an action wherein the Will of Zepha M. Nassano is or may be the subject of a Will contest by the clients.

In consideration of the services rendered and to be rendered by the attorneys in that behalf, it is agreed that the attorneys shall receive thirty-three and one-third (33- 1/3) percent of whatever sum may be recovered by the clients in said Will contest by settlement or by trial, which may be the value of the property of the clients as determined by the inventory or later appraisal.

The attorneys have accepted and do hereby accept said retainer and employment and agree and undertake to negotiate for a settlement of said claim, to undertake legal proceedings thereon and prosecute the same to final determination, and to do and perform all other acts, which, in the judgment of the attorneys, are necessary or proper to enforce and protect the rights of the clients.

It is mutually agreed that if nothing is recovered on said claim, the attorneys shall receive no compensation, but the attorneys shall not in any event be liable for costs or expenses of any kind.

The client may be required to pay other expenses for expert testimony or exhibits, prior to trial, if deemed necessary by the attorneys and the clients.

In view of the fact that the attorneys will do certain work and incur certain obligations by reason of this contract of employment, it is understood that the authority herein granted is irrevocable.

The attorneys are authorized to receive and collect any final judgment that may be rendered on said claim, demand or chose in action, and to satisfy the same on the records of the Court.

It is further mutually agreed that any and all sums of money that may be received by either party on account of any settlement or compromise of said claim, demand or chose in action, or of any judgment hereafter rendered thereof, shall be received and held by the party receiving the same as the agent or bailee of the other party and subject to all the duties and liabilities attaching to such relation, until such party thereby shall have received his proper share of such

money according to the terms of this Agreement.

Executed in duplicate the day and year first above written.

JUDGMENT ENTRY

For the reason stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Delaware County, Ohio, is reversed, and this cause is remanded to that court for further proceedings according to law.

JOHN R. MILLIGAN, P.J.

JOHN R. HOFFMAN, J.

EARLE E. WISE, J.